

EXCERPTS FROM MISCELLANEOUS ORDER NO. 3

PREFACE

Pursuant to the provisions of Criminal Justice Act of 1964 (18 U.S.C. 3006A) as amended by the Act of October 14, 1970 (P.L. 91-447, 91st Cong., 84 Stat. 916), the judges of the United States District Court for the Northern District of Texas have adopted the following amended Plan for the adequate representation of any person otherwise financially unable to obtain adequate representation,

- (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in 18 U.S.C. 1(3)), or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, or
- (2) who is under arrest, when such representation is required by law, or
- (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, subject to the conditions of 18 U.S.C. 3006A(g) as amended, or
- (4) who is a person for whom the Sixth Amendment to the Constitution requires the appointment of counsel, or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel.

Representation shall include counsel and investigative, expert, and other services necessary for an adequate defense.

I. Provision for Furnishing Counsel

A. This plan provides for the furnishing of legal services by a Federal Public Defender Organization, supervised by a Federal Public Defender, and serving the United States District Court for the Northern District of Texas. In addition, this plan provides for the appointment and compensation of private counsel in a substantial proportion of cases. Appointment of private counsel will be made from panels in each Division of attorneys found by the Court to be competent and qualified to represent a defendant in the proceedings.

B. The determination of whether a party entitled to representation will be represented by the Federal Public Defender Organization or by private counsel is within the discretion of the appointing judge or magistrate. Insofar as practical, private attorney appointments will be made in at least 25 percent of the cases.

(Amended April 21, 1988 by Misc. Order No. 3.)

II. Source of Names

A. A separate panel of attorneys shall be designated by the Court for each Division. Such panels shall consist of lawyers licensed to practice law in Texas for a period of not less than four years, who are found qualified and competent to represent defendants under the Act, and who maintain law practices in the city and county in which court is held and are members of the bar of this Court. The Bar Association of such cities and counties, have heretofore prepared and furnished to the Court a list of attorneys who, in the opinion of the certifying bar association, are competent to give adequate representation to parties under the Act, and who are willing to serve. The Court has on the basis of such lists and its own inquiry, established and approved panels of attorneys in each Division. The Court ratifies such existing panels. Such panels shall be revised from time to time as approved by the Court. Any judge or magistrate judge of the Court may, by order finding qualification as required herein, add the names of additional attorneys to the list; or, for good cause may remove the names of attorneys from the list.

B. In addition to these panels, a volunteer panel of attorneys who meet the same qualifications described in section A above shall be established in the Dallas Division replacing the existing panel. This panel will be comprised of no fewer than 150 nor more than 300 members who will furnish quality representation and who represent the diversity of the attorney population. A Screening Committee appointed by the Chief Judge will review all applications and submit its recommendations for membership to the Dallas Division judges. The judges of the Dallas Division will approve the final list of panel members. Following adoption of the final list, the Screening Committee or any judge of the court may recommend the addition and deletion of attorney panel members; the judges of the Dallas Division will approve these additions or deletions. The existing source list described in section A shall be maintained, however, in the event it is needed to supplement the volunteer panel list.

(Amended December 30, 1993 by Misc. Order No. 3)

III. Determination of Need for Counsel

A. When Appearing Before a Magistrate or Court in a Criminal Case.

In every criminal case in which the party is charged with a felony or misdemeanor (other than a petty offense), or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor, or with a violation of probation, and appears without counsel, the magistrate or the court shall advise the party that he has the right to be represented by counsel throughout the case and that counsel will be appointed to represent him if he so desires and if he is financially unable to obtain counsel.

Whenever the party states that he is financially unable to obtain counsel and desires the appointment of counsel, it shall be the duty of the court or magistrate to inquire into and to make a finding as to whether the defendant is financially able to obtain counsel. An appointment may be made retroactive to include any representation furnished prior to such appointment as is otherwise explained in Subtitle B infra. The court or the magistrate shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel, or when other good cause is shown.

All statements made by a defendant in such an inquiry shall be either (a) by affidavit sworn to before a judge, a court clerk, or his deputy, a magistrate, or a notary public or (b) under oath in open court before a magistrate or a judge.

B. Counsel for Person Arrested when Representation Is Required by Law.

Where a person arrested has been represented by counsel before his presentation before a judicial officer under circumstances where such representation is required by law, his counsel may subsequently apply to the court or a magistrate for approval of compensation. If the court or magistrate finds such person has been and is then financially unable to obtain an adequate defense, and that such representation was required by law, compensation will be made retroactive to cover out-of-court time expended by the attorney during the arrest period, and in addition cover compensation for services rendered from the time of his initial presentation before a magistrate, or the court, as the case may be. The court or magistrate may make retroactive appointment of counsel where such attorney will continue to represent such party in criminal proceedings in this court. If the person represented is unavailable at the time counsel applies to the court for approval of compensation for services rendered during the arrest period, the attorney may nevertheless submit his claim to the court for approval based on the arrestee's financial condition and a showing that such representation was required by law.

C. Other Appointments as of Right.

The court or magistrate may proceed as under Subtitle A above to make an appointment of counsel for a person (1) whom the Sixth Amendment to the Constitution requires the appointment of counsel or (2) for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel.

D. Discretionary Appointments

Any person subject to revocation of parole, in custody as a material witness, or seeking relief under 28 U.S.C. 2241, 2254, or 2255 of Title 28 or 18 U.S.C. 4245 may apply to the court or magistrate to be furnished representation based on a showing (1) that the interests of justice so require and (2) that such person is financially unable to obtain representation. Such application shall be verified and in such written form as is prescribed by the Judicial Conference of the United States. If the party applicant is not before the court, the court or magistrate may, without requiring the personal appearance of the party for such purpose, act on the basis of the form

alone, or the form as supplemented by such information as may be made available by an officer or custodian or other responsible officer, provided that such information is also made available to the party. The court or magistrate may approve such representation on a determination that the interests of justice so require and that such person is financially unable to obtain representation.

IV. Appointment of Counsel

A. The Magistrate

In every criminal case in which a party is charged with a felony or misdemeanor other than a petty offense, or with violation of probation, and appears without counsel before a magistrate, it is the duty of the magistrate not only to advise the party of his right to counsel before the magistrate and throughout the case, but also promptly to appoint counsel to represent the party if the magistrate finds that the party is financially unable to obtain an attorney, unless the party waives his right to be represented by counsel. The magistrate shall similarly proceed in any proceeding as described in Subtitle C of Title III above.

The magistrate shall in selecting and appointing such counsel designate a private attorney selected from the appropriate panel as approved by the court. The party shall not have the right to select his appointed counsel.

Counsel appointed by a magistrate shall, unless excused by order of court or magistrate, continue to act for the party throughout the proceedings in this court. In the event that a criminal defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right of appeal and of his right to counsel on appeal. If requested to do so by the defendant in a criminal case, counsel shall file a timely Notice of Appeal, and he shall continue to represent the defendant unless, or until, he is relieved by the District Court or the Court of Appeals. If counsel appointed by a magistrate in any proceeding wishes to be relieved, he shall communicate his wish to the magistrate or judge before whom the case is then pending.

The magistrate before whom a case is pending may, in the interest of justice, substitute one appointed counsel for another at any stage of the proceedings before him. If at any time after the appointment of counsel, the magistrate finds that the party is financially able to obtain counsel or make partial payment for the representation, he may terminate the appointment of

counsel or recommend to the court that any funds available to the party be ordered paid as provided in 18 U.S.C. 3006A(f).

If at any stage of the trial proceedings, the magistrate finds that the party is financially unable to pay counsel whom he had retained or to obtain other counsel, the magistrate may make an original appointment of counsel in accordance with the general procedure set forth in this Plan, which counsel may claim compensation for services rendered after such appointment.

A claim for compensation and reimbursement of expenses of counsel appointed in a case tried before the magistrate shall be made to the magistrate on the prescribed CJA form. The magistrate shall examine each claim, and make a recommendation to the court as to the amount which the court should fix in accordance with the statute and this Plan, unless the matter is concluded before him, in which case the magistrate himself may approve the claim.

Counsel for a defendant charged with a minor offense, other than a petty offense, to be tried before the magistrate, may, in an ex parte application to the United States magistrate, request investigative, expert or other services if the defendant is financially unable to obtain them. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the defendant is financially unable to obtain them, the magistrate shall recommend to the court that counsel be authorized to obtain such services on behalf of the defendant. The magistrate may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, recommend that the court ratify such services after they have been obtained. A claim for any such services shall be reviewed by the magistrate who shall make a recommendation to the judge with respect to the amount to be allowed by the court in accordance with the statute.

B. The Clerk

If counsel has not been appointed by the magistrate or the appointment of such counsel has been terminated by the court, and the clerk learns from the report of the magistrate, from the United States Attorney, from the party himself, or otherwise, that a party having a right to counsel desires to have counsel appointed to him, then ---

(a) if no affidavit of financial inability to employ counsel has been filed with the clerk, he shall promptly send to the party a form of affidavit, to be filled out by the party and returned to the clerk; or

(b) if the notice to the clerk includes an affidavit of such financial inability to employ counsel or as soon as the clerk receives such an affidavit, the clerk shall promptly arrange for the appointment of counsel in the manner provided in Section C of this Subtitle. If in similar circumstances the clerk is apprised of the fact that a party as described in Subtitle D of Title III of this Plan desires to apply for a discretionary appointment of counsel, he shall promptly send such party the appropriate CJA forms to be executed and filed in accordance with said Subtitle D. of Title III.

C. The Judge or Magistrate

Whenever the clerk presents to a judge or magistrate of this court a proposed order for the appointment of counsel for a party entitled as of right to counsel and the judge or magistrate is satisfied that the party desires counsel and is financially unable to employ counsel, the judge or magistrate shall appoint counsel for him.

If a judge or magistrate, the clerk, the United States Attorney, other law enforcement officer, a Parole Board representative, an appointed attorney, or a representative of a bar association challenges the claimed financial inability of a party to employ a lawyer, the determination of the defendant's right to have appointed counsel shall be made by a judge or magistrate of this court.

Whenever it shall appear to the presiding judge at the time of arraignment or at any other time, that a party entitled as of right to counsel is not represented by counsel and has not voluntarily waived the assistance of counsel, the judge shall determine whether such defendant is financially able to obtain counsel and, if not, whether he wishes the judge to appoint counsel for him or shall refer the matter to a magistrate for such determination. The judge or magistrate may also make a discretionary appointment as provided in Subtitle D of Title III. If in either situation the judge or magistrate concludes that counsel should be appointed, such appointment will be made from the appropriate panel; provided, however, that in extraordinary situations, in the

interest of justice, the judge or magistrate may appoint any member of the bar of this court to represent such a party. The party shall not have the right to select his appointed counsel.

Counsel appointed by a judge or magistrate shall, unless excused by order of court, continue to act for the party throughout the proceedings in this court. In the event that a criminal defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right of appeal and of his right to counsel on appeal. If requested to do so by such defendant, counsel shall file a timely Notice of Appeal, and he shall continue to represent the defendant unless, or until, he is relieved by the Court of Appeals.

A judge or magistrate may, in the interest of justice, substitute one appointed counsel for another at any stage of any proceeding in this court.

D. Redetermination of Need

If at any stage of the proceeding, a judge or magistrate shall find that a party for whom counsel has not previously been appointed under this Plan but who has retained his own attorney, is financially unable to provide for his continued representation, the judge or magistrate may appoint counsel for such party. The court or magistrate will ordinarily not appoint the same attorney.

No appointed counsel may request or accept any payment or promise of payment for assisting in the representation of a defendant, unless such payment is approved by order of court or except under the circumstances set forth in Subtitle B of Title III, supra.

If at any time after his appointment counsel should have reason to believe that a party is financially able to obtain counsel or to make partial payment for counsel, he shall advise the court. The court will then take appropriate action, which may include permitting assigned counsel to continue to represent the party with part or all of the cost of representation defrayed by such defendant.

In such event, the amount so paid or payable by the party shall be considered by the court in determining the total compensation to be allowed to such attorney.

V. Investigative, Expert and Other Services

A. Upon Request

Counsel (whether or not appointed under the Criminal Justice Act) for a party who is financially unable to obtain investigative, expert or other services necessary for an adequate defense in his case may request such services in an ex parte application before a judge, or before a magistrate if the services are required in connection with a matter over which the magistrate has jurisdiction, or if the judge otherwise refers such application to a magistrate for findings and report. Upon finding, after appropriate inquiry in such ex parte proceeding, that the services are necessary, and that the person is financially unable to obtain them, the court, or the magistrate, as the case may be, shall authorize counsel to obtain the services. The judge or magistrate may establish a limit on the amount which may be expended or promised for such services within the maximum prescribed by 18 U.S.C. 3006A(e)(3).

B. Without Prior Request

A counsel, appointed under the Criminal Justice Act, may obtain, subject to later review, investigative, expert, or other services without prior authorization, if necessary for an adequate defense. The total cost of services obtained without prior authorization, however, may not exceed a maximum of \$150 and expenses reasonably incurred, and no greater amount may be authorized regardless of the number of persons used or the character of services. A sworn application may be made by counsel to the court on the appropriate CJA form for the ex parte review by the judge or magistrate and for ratification of such expenses. Such expenditures without prior court authorization are not favored, and in addition to showing that such expenditures were "necessary for an adequate defense" and that the person was financially unable to obtain them, the application for ratification must show why prior authorization could not have been obtained.

C. Necessity of Affidavit

The statements made by or on behalf of the party in support of the request under Subtitles A or B supra, shall be made either by affidavit sworn to before the clerk, or other appropriate officer, or under oath in open court, or before the magistrate.

VI. Compensation

A. Individual Payments to Counsel Appointed Under This Plan

Payment of fees and expenses to counsel appointed under this Plan, and payment for investigative, expert, and other services incurred pursuant to Title V hereof, shall be made in accordance with such rules and regulations and guidelines, as have been or may be prescribed from time to time by the Judicial Conference of the United States, and in accordance with the fiscal policies of the Administrative Office of the United States Courts.

. . . .

VII. Forms

Where standard forms have been approved by the Judicial Conference of the United States or an appropriate committee thereof, and have been distributed by the Administrative Office, such forms shall be used by the court, the clerk, the magistrates, and counsel.

VIII. Record of Proceeding before a United States Magistrate

In accordance with Rule 5 of the Rules of Procedure for United States Magistrates, and Title 18, United States Code, Section 3401(e), preliminary examinations and trial of all minor offenses (except in a petty offense case when the making of a verbatim record is waived) shall be recorded by sound recording equipment or shall be taken down by a court reporter. In all other proceedings a record shall be made if a judge or magistrate shall so direct. If no record is made, the entries on the Magistrate's docket shall constitute the record of the proceedings.

IX. Responsibility for Contacting Defendant or Attorney

A. Defendant in Jail

If the defendant is in jail, the attorney appointed shall contact the defendant as soon as possible, and in any event within three days after his appointment, and shall proceed with the case.

B. Defendant on Bail

If the defendant is free on bond, he shall contact his appointed attorney at his office as soon as possible, and in any event within three days of the date of the order of appointment.

C. Failure to Comply with Order

Failure of counsel to contact the defendant or of the defendant to contact his appointed counsel, as hereinabove provided, will be called to the attention of the Court, through the Clerk, promptly by the defendant or appointed counsel, as the case may be.

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